

**SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT
AND NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL AVENUE
PIERRE, SOUTH DAKOTA 57501-3181**

draft

**AUTHORIZATION TO DISCHARGE UNDER THE
SURFACE WATER DISCHARGE SYSTEM**

In compliance with the provisions of the South Dakota Water Pollution Control Act and the Administrative Rules of South Dakota (ARSD), Chapters 74:52:01 through 74:52:11,

Higman Sand and Gravel

is authorized under this permit to discharge to

the Big Sioux River, Brule Creek, Turkey Creek, and the Vermillion River

from its facilities as described in Part 1.1. of this permit, in accordance with discharge points, effluent limits, monitoring requirements, and other conditions set forth herein. Authorization is limited to those outfalls specifically listed in the permit. The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the South Dakota Water Pollution Control Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

This permit shall become effective [Permit Effective Date].

This permit and the authorization to discharge shall expire at midnight, [Expiration Date].

Signed this day of

Steven M. Pirner
Secretary
Department of Environment and Natural Resources

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DEFINITIONS

30-day (and monthly) average means the arithmetic average of all samples collected during a consecutive 30-day period or calendar month, whichever is applicable. The calendar month shall be used for purposes of reporting self-monitoring data on discharge monitoring report forms.

7-day (and weekly) average means the arithmetic mean of all samples collected during a consecutive 7-day period or calendar week, whichever is applicable. The calendar week which begins on Sunday and ends on Saturday, shall be used for purposes of reporting self-monitoring data on discharge monitoring report forms. Weekly averages shall be calculated for all calendar weeks with Saturdays in the month. If a calendar week overlaps two months (i.e., the Sunday is in one month and the Saturday in the following month), the weekly average calculated for that calendar week shall be included in the data for the month that contains the Saturday.

Acute Toxicity occurs when 50 percent or more mortality is observed for either species at any effluent concentration. Mortality in the control must simultaneously be 10 percent or less for the effluent results to be considered valid.

Chronic Toxicity occurs when the survival, growth, or reproduction, as applicable, for either test species, at the effluent dilution(s) designated in this permit, is significantly less (at the 95 percent confidence level) than that observed for the control specimens

ARSD means the Administrative Rules of South Dakota.

An **Authorized Release** is a discharge from a permitted outfall that meets all permit conditions and effluent limits.

BOD₅ means Five-Day Biochemical Oxygen Demand. BOD is a measurement of the amount of oxygen utilized by the decomposition of organic material, over a specified time period (usually 5 days) in a sample.

A **Bypass** is the intentional diversion of waste streams from any portion of a treatment facility.

Composite samples shall be flow proportioned. The composite sample shall contain at least four samples collected over the compositing period. Unless otherwise specified, the time between the collection of the first sample and the last sample shall not be less than six hours nor more than 24 hours. Acceptable methods for preparation of composite samples are as follows:

1. Constant time interval between samples, sample volume proportional to flow rate at time of sampling;
2. Constant time interval between samples, sample volume proportional to total flow (volume) since last sample. For the first sample, the flow rate at the time the sample was collected may be used;
3. Constant sample volume, time interval between samples proportional to flow (i.e. sample taken every "X" gallons of flow); and
4. Continuous collection of sample, with sample collection rate proportional to flow rate.

Daily Maximum (Daily Max.) is the maximum value allowable in any single sample or instantaneous measurement.

DMR means Discharge Monitoring Report, EPA Form 3320-1, or a report filed electronically by an EPA-approved electronic system, which is used to report sampling data.

EPA or U.S. EPA means United States Environmental Protection Agency.

Existing Source means any building, structure, facility or installation from which there is or may be a discharge of pollutants, which is not considered a New Source.

A **grab** sample, for monitoring requirements, is a single "dip and take" sample collected at a representative point in the discharge stream.

IC25 (inhibition concentration) is a point estimate of the toxicant concentration that would cause a 25% reduction in a nonlethal biological measurement of the test organism, such as reproduction or growth.

An **instantaneous** measurement, for monitoring requirements, is a single reading, observation, or measurement.

NOEC (no observed effect concentration) is the highest tested concentration of an effluent or a toxicant at which no adverse effects are observed on the aquatic test organism at a specific time of observation. Determined using hypothesis testing.

New Source means any building, structure, facility or installation from which there is or may be a discharge of pollutants, the construction of which commenced after the publication of proposed Pretreatment Standards under Section 307(c) of the Federal Clean Water Act which will be applicable to such source if such Standards are thereafter promulgated in accordance with that section, provided that:

1. The building, structure, facility or installation is constructed at a site at which no other source is located; or
2. The building, structure, facility or installation totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or
3. The wastewater generating processes of the building, structure, facility, or installation are substantially independent of an existing source at the same site. In determining whether these are substantially independent; factors, such as the extent to which the new facility is integrated with the existing plant, and the extent to which the new facility is engaged in the same general type of activity as the existing source should be considered.

Construction on a site at which an existing source is located results in a modification rather than a new source if the construction does not create a new building, structure, facility or installation meeting the criteria of b or c of this section but otherwise alters, replaces, or adds to existing process or production equipment. Construction of a new source has commenced if the owner or operator has:

1. Begun, or caused to begin as part of a continuous onsite construction program:
 - a. Any placement, assembly, or installation of facilities or equipment; or
 - b. Significant site preparation work including clearing, excavation, or removal of existing buildings, structures, or facilities which is necessary for the placement, assembly, or installation of new source facilities or equipment.
2. Entered into a binding contractual obligation for the purchase of facilities or equipment which is intended to be used in its operation within a reasonable time. Options to purchase or contracts which can be terminated or modified without substantial loss, and contracts of feasibility, engineering, and design studies do not constitute a contractual obligation under this paragraph.

pH is the measure of the hydrogen ion concentration of water or wastewater; expressed as the negative log of the hydrogen ion concentration. A pH of 7 is neutral. A pH less than 7 is acidic, and a pH greater than 7 is basic.

Process Wastewater means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product.

SDDENR means the South Dakota Department of Environment and Natural Resources.

Secretary means the Secretary of the South Dakota Department of Environment and Natural Resources, or authorized representative.

Severe property damage means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

Sewage Sludge is any solid, semi-solid or liquid residue that contains materials removed from domestic sewage during treatment. Sewage sludge includes, but is not limited to, primary and secondary solids and sewage sludge products.

Toxic Pollutant is any pollutant listed as toxic under §307(a)(1) of the federal Clean Water Act.

TSS means **Total Suspended Solids**. TSS is a measure of the filterable solids present in a sample.

An **Unauthorized release** is a discharge from the lower end of the treatment or containment system through a release structure or over or through retention dikes that does not meet all permit conditions or effluent limits. An unauthorized release is distinguished from a sanitary sewer overflow in that a sanitary sewer overflow discharges wastewater prior to treatment or containment.

An **Upset** is an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limits because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

1.0 EFFLUENT LIMITS AND MONITORING REQUIREMENTS

1.1 Description of Discharge Points

The authorization to discharge provided under this permit is limited to those outfalls specifically designated below as discharge locations. Discharges at any location not authorized under a SWD permit is a violation of the South Dakota Water Pollution Control Act and could subject the person{s} responsible for such discharge to penalties under Section 34A-2-75 of the Act. Knowingly discharging from an unauthorized location or failing to report an unauthorized discharge within a reasonable time from the first learning of an unauthorized discharge could subject such person to criminal penalties as provided under the South Dakota Water Pollution Control Act.

Outfall

Serial Number	Description of Discharge Point
001	Any discharge to Brule Creek from Higman Sand and Gravel – Spink Pit located in the southwest ¼ of Section 5, Township 93 North, Range 50 West, in Union County, South Dakota (Latitude 42.900278°, Longitude -96.779722°)
002	Any discharge to the Big Sioux River from Higman Sand and Gravel – Hudson Pit located in the Northeast ¼ of Section 2, Township 95 North, Range 48 West, in Union County, South Dakota (Latitude 43.079143°, Longitude -96.481580°)
003	Any discharge to the Big Sioux River from Higman Sand and Gravel – West Hawarden Pit is located in the Southeast ¼ of Section 21, Township 95 North, Range 48 West, in Union County, South Dakota (Latitude 43.026408°, Longitude -96.515547°)
004	Any discharge to the Vermillion River from Higman Sand and Gravel – Vermillion Pit located in the Western ½ of the Southeast ¼ of Section 29, Township 93 North, Range 51 West, in Clay County, South Dakota (Latitude 42.841895°, Longitude -96.894221°)
005	Any discharge to Turkey Creek from Higman Sand and Gravel – Volin Pit located in Section 12, Township 94 North, Range 54 West, in Yankton County, South Dakota (Latitude 42.969016°, Longitude -97.173214°)

1.2 Effluent Limits - Outfalls 001, 002, 003, 004, and 005

Effective immediately and lasting through the life of this permit, the quality of effluent discharged from the facility shall, as a minimum, meet the limits as set forth below:

Effluent Characteristic	Effluent Limit		
	30-Day Average ¹	7-Day Average ¹	Daily Maximum ¹
Total Suspended Solids (TSS), mg/L	25	N/A	45
Total Dissolved Solids (TDS), mg/L	2,500	N/A	4,375
Conductivity, μ mhos/cm	2,500	N/A	4,375
Oil and Grease (hexane ext), mg/L	N/A	N/A	10
Water Temperature, °C	N/A	N/A	20
The pH of the discharge shall not be less than 6.5 standard units nor greater than 9.0 standard units in any sample.			
There shall be no discharge of industrial wastes that produce floating solids, scum, oil slicks, material discoloration, visible gassing, sludge deposits, sediments, slimes, algal blooms, fungus growths, or other offensive effects.			
The discharge shall not impart a visible film or sheen to the surface of the water or the adjoining shorelines.			
There shall be no discharge of sanitary wastewater.			

¹ See Definitions.

1.3 Self-Monitoring Requirements – Outfalls 001, 002, 003, 004, and 005

As a minimum, upon the effective date of this permit, the following constituents shall be monitored at the frequency and with the type of measurement indicated; samples or measurements shall be representative of the volume and nature of the monitored discharge. If no discharge occurs during the entire monitoring period, it shall be stated on the Discharge Monitoring Report Form (EPA No. 3320-1) that no discharge or overflow occurred.

Effluent Characteristic	Frequency	Reporting Values ¹	Sample Type
Total Flow, gallons	Each discharge	Monthly Total	Calculated
Duration of Discharge, days	Each discharge	Monthly Total	Calculated
Flow Rate, gallons per day	At least three per discharge	Daily Maximum; 30-Day Average	Instantaneous
pH, standard units	At least three per discharge	Daily Minimum; Daily Maximum	Instantaneous ²
Water Temperature, °C	At least three per discharge	Daily Maximum; 30-Day Average	Instantaneous ³
Conductivity, µmhos/cm	At least three per discharge	Daily Maximum; 30-Day Average	Grab
Total Dissolved Solids (TDS), mg/L	At least three per discharge	Daily Maximum; 30-Day Average	Grab
Total Suspended Solids (TSS), mg/L	At least three per discharge	Daily Maximum; 30-Day Average	Grab
Oil and Grease (hexane ext), mg/L	Contingent ⁴	Daily Maximum	Grab
Oil and Grease, visual	Daily	Presence or Absence of Sheen	Visual ⁴
Visible Pollutants	Daily	Presence or Absence	Visual

1 See Definitions.

2 pH shall be taken within 15 minutes of sample collection with a pH meter. The pH meter must be capable of simultaneous calibration to two points on the pH scale that bracket the expected pH and are approximately three standard units apart. The pH meter must read to 0.01 standard units and be equipped with temperature compensation adjustment. Readings shall be reported to the nearest 0.1 standard units.

3 The water temperature of the discharge shall be taken as a field measurement. Measurement shall be made with a mercury-filled, or dial type thermometer, or a thermistor. Readings shall be reported to the nearest degree Celsius.

4 Oil and grease shall be visually monitored during discharge. In the event that an oil sheen or floating oil is observed during discharge, grab samples shall be taken immediately, analyzed using Standard Method 5520-F (hexane extraction with silica gel) and reported.

1.4 Inspection Requirements

The permittee shall inspect its facility on at least a **monthly** basis and **daily** when the facility is discharging. The inspection shall be conducted to determine if a discharge is occurring, has occurred since the previous inspection, and/or if a discharge is likely to occur before the next inspection. In addition, the inspection shall be performed to determine if proper operation and maintenance procedures are being undertaken at the facility. The permittee shall maintain a notebook recording information obtained during the inspection. At a minimum, the notebook shall include the following:

1. Date and time of the inspection;
2. Name of the inspector(s);
3. The facility's discharge status;
4. Identification of operational problems and/or maintenance problems;
5. Recommendations, as appropriate, to remedy identified problems;
6. A brief description of any actions taken with regard to problems identified; and
7. Other information, as appropriate.

The permittee shall maintain the notebook in accordance with proper record-keeping procedures and shall make the notebook available for inspection, upon request, by the Secretary or the U.S. EPA.

2.0 MONITORING, RECORDING AND REPORTING REQUIREMENTS

2.1 Representative Sampling

Samples taken in compliance with the monitoring requirements established under Section 1.3 shall be collected from the effluent stream prior to discharge into the receiving waters. Samples and measurements shall be representative of the volume and nature of the monitored discharge.

2.2 Monitoring Procedures

Monitoring must be conducted according to test procedures approved under ARSD 74:52:03:06, a.b.r. 40 CFR, Part 136, unless other test procedures have been specified in this permit.

2.3 Reporting of Monitoring Results

Effluent monitoring results obtained during the previous three months shall be summarized for each month and reported on a Discharge Monitoring Report Form (EPA No. 3320-1) and submitted to SDDENR on a **quarterly** basis and postmarked no later than the 28th day of the month following the completed reporting period. If no discharge occurs during the reporting period, "no discharge" shall be reported. Legible copies of these, and all other reports required herein, shall be signed and certified in accordance with the Signatory Requirements (see Section 2.14), and submitted to the Secretary at the following addresses:

original to: Department of Environment & Natural Resources
 Surface Water Quality
 PMB 2020
 Joe Foss Building
 523 East Capitol
 Pierre SD 57501-3182

2.4 Compliance Schedules

Reports of compliance or noncompliance with, or any progress reports on interim and final requirements contained in any Compliance Schedule of this permit shall be submitted no later than 14 days following each schedule date.

2.5 Additional Monitoring by the Permittee

If the permittee monitors any pollutant more frequently than required by this permit, using test procedures approved under ARSD 74:52:03:06, a.b.r. 40 CFR 136 or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR. Such increased frequency shall also be indicated.

2.6 Records Contents

Records of monitoring information shall include:

1. The date, exact place, and time of sampling or measurements;
2. The initials or name(s) of the individual(s) who performed the sampling or measurements;
3. The date(s) analyses were performed;
4. The time analyses were initiated;
5. The initials or name(s) of individual(s) who performed the analyses;
6. References and written procedures, when available, for the analytical techniques or methods used; and,
7. The results of such analyses, including the bench sheets, instrument readouts, computer disks or tapes, etc., used to determine these results.

2.7 Retention of Records

The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least three years from the date of the sample, measurement, report or application. This period may be extended by request of the Secretary at any time. Data collected on site, copies of Discharge Monitoring Reports, and a copy of this permit must be maintained on site during the duration of activity at the permitted location.

2.8 Twenty-four Hour Notice of Noncompliance Reporting

1. The permittee shall report any noncompliance which may endanger health or the environment as soon as possible, but no later than twenty-four (24) hours from the time the permittee first became aware of the circumstances. The report shall be made to the State of South Dakota at (605) 773-3231 and the EPA, Region VIII, Emergency Response Branch at (303) 293-1788.
2. The following occurrences of noncompliance shall be reported by telephone to the Secretary at (605) 773-3351 by the first workday (8:00 a.m. – 5:00 p.m. Central Time) following the day the permittee became aware of the circumstances:
 - a. Any unanticipated bypass which exceeds any effluent limit in the permit (See Section 3.7, Bypass of Treatment Facilities);
 - b. Any upset which exceeds any effluent limit in the permit (See Section 3.8, Upset Conditions); or,
 - c. Violation of a maximum daily discharge limit for any of the pollutants listed in the permit.
3. A written submission shall also be provided within five days of the time that the permittee becomes aware of the circumstances. The written submission shall contain:
 - a. A description of the noncompliance and its cause;
 - b. The period of noncompliance, including exact dates and times;
 - c. The estimated time noncompliance is expected to continue if it has not been corrected; and,
 - d. Steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.
4. The Secretary may waive the written report on a case-by-case basis if the oral report has been received within 24 hours by the Surface Water Quality Program, South Dakota Department of Environment and Natural Resources, Pierre, (605) 773-3351.
5. Reports shall be submitted to the addresses in Section 2.3, Reporting of Monitoring Results.

2.9 Other Noncompliance Reporting

Instances of noncompliance not required to be reported within 24 hours shall be reported at the time that monitoring reports for Section 2.3 are submitted. The reports shall contain the information listed in Section 2.8.

2.10 Changes in Discharge of Toxic Substances

The permittee shall notify the Secretary if any discharge of toxic pollutants has occurred or will occur. Notification is required if the permit does not contain a limit for the toxic pollutant and if the pollutant will exceed one of the following notification levels, as appropriate:

1. Two hundred micrograms per liter (200 µg/L) for acrolein and acrylonitrile;
2. Five hundred micrograms per liter (500 µg/L) for 2,4-dinitrophenol and for 2-methyl-4, 6-dinitrophenol;
3. One milligram per liter (1 mg/L) for antimony;

4. Five (5) times the maximum concentration value reported for that pollutant in the permit application: or
5. One hundred micrograms per liter (100 µg/L) for all other parameters.

2.11 Planned Changes

The permittee shall give notice to the Secretary as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when the alteration or addition could significantly change the nature or increase the quantity of pollutant discharged. This notification applies to pollutants which are not subject to effluent limits in the permit. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source (see ARSD, Chapter 74:52:01:01(30)).

2.12 Duty to Provide Information

The permittee shall furnish to the Secretary, within a reasonable time, any information which the Secretary may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish to the Secretary, upon request, copies of records required to be kept by this permit.

2.13 Other Information

When the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or any report to the Secretary, it shall promptly submit such facts or information.

2.14 Signatory Requirements

All applications, reports or information submitted to the Secretary shall be signed and certified.

1. All permit applications shall be signed as follows:
 - a. For a corporation: by a responsible corporate officer;
 - b. For a partnership or sole proprietorship: by a general partner or the proprietor, respectively;
 - c. For a municipality, State, Federal, or other public agency: by either a principal executive officer or ranking elected official.
2. All reports required by the permit and other information requested by the Secretary shall be signed by a person described above or by a duly authorized representative of that person. A person is a duly authorized representative only if:
 - a. The authorization is made in writing by a person described above and submitted to the Secretary; and,
 - b. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility, such as the position of plant manager, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters. (A duly authorized representative may thus be either a named individual or any individual occupying a named position.)
3. Changes to authorization. If an authorization under paragraph 2.14.2 is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of paragraph 2.14.2 must be submitted to the Secretary prior to or together with any reports, information, or applications to be signed by an authorized representative.
4. Certification. Any person signing a document under this section shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

3.0 COMPLIANCE RESPONSIBILITIES

3.1 Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application. The permittee shall give the director advance notice of any planned changes at the permitted facility or of an activity which may result in permit noncompliance.

3.2 Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

3.3 Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit. However, the permittee shall operate, as a minimum, one complete set of each main line unit treatment process whether or not this process is needed to achieve permit effluent compliance.

3.4 Need to Halt or Reduce Activity not a Defense

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

3.5 Removed Substances

Collected screenings, grit, solids, sludges, or other pollutants removed in the course of treatment shall be disposed of in such a manner so as to prevent any pollutant from entering any waters of the state or creating a health hazard. Sludge/digester supernatant and filter backwash shall not be directly blended with or enter either the final plant discharge and/or waters of the State.

3.6 Inspection and Entry

The permittee shall allow the Secretary or EPA, upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and,
4. Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.

3.7 Bypass of Treatment Facilities

1. Bypass not exceeding limits. The permittee may allow any bypass to occur which does not cause effluent limits to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs 2 and 3 of this section.
2. Notice:
 - a. Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least 60 days before the date of the bypass.

- b. Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required under Section 2.8, Twenty-four Hour Notice of Noncompliance Reporting.
3. Prohibition of bypass.
 - a. Bypass is prohibited and the Secretary may take enforcement action against a permittee for a bypass, unless:
 - (1) The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
 - (2) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and,
 - (3) The permittee submitted notices as required under paragraph 2 of this section.
 - b. The Secretary may approve an anticipated bypass, after considering its adverse effects, if the Secretary determines that it will meet the three conditions listed above in paragraph 3.a of this section.

3.8 Upset Conditions

1. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with technology based permit effluent limits if the requirements of paragraph 2 of this section are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review (i.e., Permittees will have the opportunity for a judicial determination on any claim of upset only in an enforcement action brought for noncompliance with technology-based permit effluent limits).
2. Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:
 - a. An upset occurred and that the permittee can identify the cause(s) of the upset;
 - b. The permitted facility was at the time being properly operated;
 - c. The permittee submitted notice of the upset as required under Section 2.8, Twenty-four Hour Notice of Noncompliance Reporting; and,
 - d. The permittee complied with any remedial measures required under Section 3.2, Duty to Mitigate.
3. Burden of proof. In any enforcement proceeding, the permittee seeking to establish the occurrence of an upset has the burden of proof.

3.9 Toxic Pollutants

The permittee shall comply with effluent standards or prohibitions established under Section 307(a) of the Federal Clean Water Act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

3.10 Anticipated Noncompliance

The permittee shall give advance notice to the Secretary of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

3.11 Permit Actions

This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

3.12 Duty to Reapply

If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit. The application should be submitted at least 180 days before the expiration date of this permit.

3.13 Availability of Reports

Except for data determined to be confidential under ARSD 74:52:02:17, all reports prepared in accordance with the terms of this permit shall be available for public inspection at the offices of SDDENR and EPA. Permit applications, permits and effluent data shall not be considered confidential.

3.14 Property Rights

The Secretary's issuance of this permit, adoption of design criteria, and approval of plans and specifications, does not convey any property rights of any sort, any exclusive privileges, any authorization to damage, injure or use any private property, any authority to invade personal rights, any authority to violate federal, state or local laws or regulations, or any taking, condemnation or use of eminent domain against any property owned by third parties. The State does not warrant that the permittee's compliance with this permit, design criteria, approved plans and specifications, and operation under this permit, will not cause damage, injury or use of private property, an invasion of personal rights, or violation of federal, state or local laws or regulations. The permittee is solely and severally liable for all damage, injury or use of private property, invasion of personal rights, infringement of federal, state or local laws and regulations, or taking or condemnation of property owned by third parties, which may result from actions taken under the permit.

3.15 Severability

The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

3.16 Transfers

This permit may be automatically transferred to a new permittee if:

1. The current permittee notifies the Secretary at least 30 days in advance of the proposed transfer date;
2. The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them; and,
3. The Secretary does not notify the existing permittee and the proposed new permittee of his or her intent to modify, or revoke and reissue the permit. If this notice is not received, the transfer is effective on the date specified in the agreement mentioned in paragraph 2 above.

3.17 Reopener Provision

This permit may be reopened and modified (following proper administrative procedures) to include the appropriate effluent limits (and compliance schedule, if necessary), or other appropriate requirements if one or more of the following events occurs:

1. Water Quality Standards: The water quality standards of the receiving water(s) to which the permittee discharges are modified in such a manner as to require different effluent limits than contained in this permit.
2. Effluent Guidelines: Effluent limit guidelines are promulgated or revised for point sources covered by this permit;
3. Water Quality Management Plan: A revision to the current water quality management plan is approved and adopted which calls for different effluent limits than contained in this permit.
4. Total Maximum Daily Load: Additional controls in the permit are necessary to implement a total maximum daily load approved by the Secretary and/or EPA.

5. Whole Effluent Toxicity: Whole effluent toxicity is detected in the discharge.
6. Noncompliance: The discharger is a significant contributor of pollution to waters of the state, presents a health hazard, or is in noncompliance with the conditions of the permit; or
7. Other Changes: Other conditions or standards change so that the discharge no longer qualifies for this permit, such as the permittee being designated as a major discharger, changes in necessary influent or effluent pollutant monitoring, additional industrial pretreatment requirements become applicable to the permittee, or other items.

3.18 Toxicity Limit-Reopener Provision

This permit may be reopened and modified (following proper administrative procedures) to include whole effluent toxicity limits if whole effluent toxicity is detected in the discharge.

4.0 PENALTIES FOR NONCOMPLIANCE

4.1 Penalties for Violations of Permit Conditions

Any person who violates a permit condition shall, upon conviction, be punished by a Class 1 misdemeanor. In addition to a jail sentence authorized by SDCL 22-6-2, a Class 1 misdemeanor imposed by SDCL, Chapter 34A-2, is subject to a criminal fine not to exceed ten thousand dollars per day of violation. The violator is also subject to a civil penalty not to exceed ten thousand dollars per day of violation, for damages to the environment of this state. Except as provided in permit conditions on Section 3.7, Bypass of Treatment Facilities and Section 3.8, Upset Conditions, nothing in this permit shall be construed to relieve the permittee of the civil or criminal penalties for noncompliance.

4.2 Penalties for Tampering

Any person who falsifies, tampers with, or knowingly renders inaccurate, any monitoring device or method required to be maintained under this permit is in violation of the provisions of SDCL 34A-2-77, and is subject to penalties under SDCL 34A-2-75. In addition to a jail sentence authorized by SDCL 22-6-2, such violators are subject to a criminal fine not to exceed ten thousand dollars per day of violation. The violator is also subject to a civil penalty not to exceed ten thousand dollars per day of violation, or for damages to the environment of this state.

4.3 Penalties for Falsification of Reports

Any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance shall, upon conviction, be punished by a Class 1 misdemeanor. In addition to a jail sentence authorized by SDCL 22-6-2, a Class 1 misdemeanor imposed by SDCL, Chapter 34A-2, is subject to a criminal fine not to exceed ten thousand dollars per day of violation. The violator is also subject to a civil penalty not to exceed ten thousand dollars per day of violation, for damages to the environment of this state, or both.

4.4 Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Federal Clean Water Act.